

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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<b>ENGLEWOOD HOSPITAL AND MEDICAL CENTER,</b>	:	Civil No. 06-00637 (HAA)
<b>Plaintiff,</b>	:	<b><u>REPORT AND RECOMMENDATION</u></b>
<b>v.</b>	:	
<b>AFTRA HEALTH FUND,</b>	:	
<b>Defendant.</b>	:	

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This matter comes before the Court on the motion of the plaintiff, Englewood Hospital and Medical Center, to remand the action to the Superior Court of New Jersey, Bergen County. The motion was opposed by defendant AFTRA Health Fund. Oral argument was heard on August 10, 2006. For the reasons set forth on the record and transcribed in the attached transcript, it is respectfully recommended that this action be remanded to the Superior Court of New Jersey, Bergen County.

Dated: August 23, 2006



Hon. Mark Falk  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

3 ENGLEWOOD HOSPITAL & MEDICAL .  
4 CENTER, .  
5 Plaintiffs, . Docket No. 06-0637 (HAAAXMF)  
6 vs. . Newark, New Jersey 07102  
7 AFTRA HEALTH FUND, . August 10, 2006  
8 Defendants.

TRANSCRIPT OF MOTION  
BEFORE THE HONORABLE MARK FALK  
UNITED STATES MAGISTRATE JUDGE

**APPEARANCES:**

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I N D E X

1 MOTION TO REMAND AND FOR COUNSEL FEES

2 THE COURT:

3 Decision

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Colloquy

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1                   THE COURT: All right, good morning, counsel. This  
2 is the case of Englewood against AFTRA Health Fund, which is  
3 Civil Action No. 06-637. Would counsel place their appearances  
4 on the record, please?

5                   MR. KASSAR: Yes, Your Honor, good morning. Camille  
6 Joseph Kassar, K-A-S-S-A-R, Maloof, Lebowitz, Connahan &  
7 Oleske, on behalf of the plaintiff.

8                   MS. GOMEZ: Good morning, Your Honor. My name is  
9 Lisa Gomez. I'm here with my associate, Suzanne D'Amato.  
10 We're from the Law Firm Cohen, Weiss & Simon, and we're here  
11 representing the defendant, The AFTRA Health Fund.

12                  THE COURT: All right. Before the Court are two  
13 motions, which I believe have been referred to me for  
14 consideration. One is the motion to remand the case to the  
15 State Court, and there's also a request for attorneys' fees as  
16 part of that motion. I have read the papers. I am familiar  
17 with the arguments. Would anyone like to be heard on this?

18                  MR. KASSAR: Your Honor, Your Honor is very well  
19 familiar -- very familiar with this issue. There are other  
20 cases you've handled accordingly. Unless the Court has  
21 specific questions, for me, I don't have anything to add to the  
22 moving papers, Judge.

23                  THE COURT: Thank you.

24                  MS. GOMEZ: Guess also we've pretty much taken up  
25 your -- part of your docket with these cases over the past few

Colloquy

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1 months, and I think that we've covered -- I think that  
2 everything has been covered amply in the papers. I would like  
3 to just to emphasize on the -- particularly on the independent  
4 legal duty point, if Your Honor has any questions as to that  
5 point, I would be happy to answer those questions.

6 THE COURT: Okay. I don't have any specific  
7 questions about the law involved necessarily. I do want to  
8 raise with you, it seems to me that there are a group of cases  
9 consolidated before Judge Lifland. Are anyone familiar with  
10 those?

11 MS. GOMEZ: Certainly, Your Honor.

12 MR. KASSAR: Yes, Your Honor.

13 THE COURT: And those involve the same issue, don't  
14 they?

15 MR. KASSAR: Yes, Your Honor.

16 MS. GOMEZ: Yes, Your Honor.

17 THE COURT: So I guess what I would wonder is there  
18 -- are there any cases, other cases -- I know there are some  
19 new cases that have just been filed. But -- an some other  
20 cases that have been decided. Seem to be a lot of cases  
21 raising this issue. Has any other case proceeded to the point  
22 where it's headed back to the Circuit, or anything like that?

23 MR. KASSAR: Not back to the Circuit, Judge.

24 THE COURT: Oh, just to --

25 MR. KASSAR: They're having decisions by, I think,

Colloquy/The Court

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1 Judge Wallace, where the case was remanded.

2 THE COURT: Yes.

3 MR. KASSAR: On -- and there were, I believe,

4 Magistrate Hedges remanded two other cases, as well, Judge.

5 We heard there were three cases argued on the same  
6 day before Judge Hedges, and I don't have the specifics in  
7 front of me, but two were remanded with essentially the consent  
8 of defense counsel, Judge. Because they did not feel that the  
9 Federal Court still had jurisdiction over the case, Your Honor.

10 On the remaining case where Ms. Gomez and I were  
11 adversaries, I believe, Judge Hedges has agreed to defer to  
12 Judge Lillard's findings on that issue, if I'm not mistaken.

13 MS. GOMEZ: I don't know, my understanding as to  
14 Judge Hedges was that he reserved decision. But I don't know  
15 that he specified that we had oral argument before Judge  
16 Hedges, I want to say it was April or May, and he reserved  
17 decision on the remand issue. We have not, yet, received an  
18 opinion.

19 As Mr. Kassar states there have been other cases that  
20 have been before this Court, and they have been remanded. But,  
21 to my knowledge of those cases, they've either been at the  
22 consent of defense counsel, or defense counsel did not respond  
23 to the motion to remand. Or I believe there's one -- there  
24 would be one or two cases where there was no evidence of an  
25 assignment presented in those cases, so they were decided on

Colloquy/The Court

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1 those grounds.

2 THE COURT: Okay, very well. Thanks, you can have a  
3 seat.

4 MR. KASSAR: Thank you, Judge.

5 THE COURT: As I said, I have read the briefing,  
6 which was quite good. But the basics is -- this is a motion to  
7 remand. The premise of the motion is the contention that this  
8 is a State breach of contract claim, which is predicated on a  
9 legal duty that's independent of E.R.I.S.A. And thereby, there  
10 is no Federal jurisdiction and the case should be remanded to  
11 the State Court.

12 Now, I do want to make clear on the record that I am  
13 treating this as a report and recommendation to Judge Ackerman,  
14 since it involved remand. The Third Circuit, I think, has made  
15 clear that that is something that is considered dispository.  
16 Although, there was a time when it was not, the Magistrate  
17 Judges did it directly.

18 I'm taking the unusual step, and I will explain this  
19 to Judge Ackerman to render a decision on the record, rather  
20 than in writing in this case. In part due to my -- the number  
21 of cases that I'm handling, the fact that this motion  
22 apparently has been around for some time, and also due to a  
23 personal matter. So, I thought since it's rather  
24 straightforward in some respects, I would do this more quickly,  
25 and simply render my decision on the record today.

The Court

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1                   So back to it, we have the remand motion and some  
2 background. On December 13<sup>th</sup>, 2005 the Englewood Hospital and  
3 Medical Center filed a complaint in the Superior Court of New  
4 Jersey, Bergen County. First calendar complaint set forth a  
5 breach of contract claim against the AFTRA Health Fund.  
6 Basically, some of the background facts are the plaintiff  
7 contracted with Multi-Plan, Inc. to become a preferred provider  
8 organization, and provide discounted hospital fees to patients  
9 covered by health plans, which contracted with Multi-Plan. The  
10 defendant also contracted with Multi-Plan as a health plan to  
11 receive access to discounted rates provided to Multi-Plan  
12 subscribers at the covered hospitals.

13                  Under the terms of the contracts between Multi-Plan  
14 and the plaintiff, health plans were only eligible for reduced  
15 fees provided they paid claims within a certain amount of time.  
16 And plaintiff apparently now claims that defendant after  
17 determining eligibility and coverage failed to pay the claims  
18 in a timely manner. So there's a claim of unjust enrichment.

19                  On February 9<sup>th</sup>, 2006, defendant filed a notice of  
20 removal, pursuant to 28 U.S.C. 1441, defendant provided the  
21 grounds for removal that the plaintiff's complaint was governed  
22 by Section 502a1B of E.R.I.S.A., 29 U.S.C. 1132a1B over which  
23 the District Court has original jurisdiction under Section  
24 1331.

25                  So, just to summarize the factual background again,

The Court

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1 the hospital, of course, is a hospital providing medical  
2 services to the public. The hospital entered into a contract  
3 with Multi-Plan. ~~Agreed to become a member of a PPO Network to~~  
4 accept this kind of payments for group health coverage.  
5 Services provided to subscribers subject to considerations  
6 detailed in the contract between hospital and Multi-Plan.

7 Defendant provides group health coverage to its  
8 members, and through a contractual relationship with Multi-  
9 Plan, the defendant accesses discounted rates for services. In  
10 order to receive those rates defendant had to comply with  
11 certain conditions, which include payment within the time plan.

12 I think that this case involves claims relating to  
13 two individuals for services rendered by the hospital. The  
14 defendant allegedly failed to make payment within the required  
15 time period to be eligible for the discounted rate. The  
16 hospital claims it's entitled to the full bill charges, and  
17 asserted this cause of action to seek the balance due in owing  
18 to the defendant.

19 According to the plaintiff, the Court is not really  
20 being asked, and I think the Court agrees, to address any  
21 issues of benefit availability under the E.R.I.S.A. plan. The  
22 issue involves the alleged failure to make timely payment to  
23 the hospital in order to qualify for the discount. Thus, the  
24 claim is -- the plaintiff's claim is that the Court lacks  
25 necessary jurisdiction to maintain the matter in Federal Court.

The Court

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1           As stated previously, this is one of many cases, many  
2 identical cases filed in this Court, that seem to be at various  
3 stages. ~~But the issue appears to be very similar, if not~~  
4 identical in all those cases. Very simply, the precise issues  
5 raised on this motion were considered and decided upon in a  
6 precedential Third Circuit decision in which the District Court  
7 was reversed. This is a case that I had some Magistrate Judge  
8 case management involvement in. But the Third Circuit reversed  
9 the District Court and found that the nearly identical case  
10 should be remanded to the Superior Court.

11           That case, as we all know, is the Pascack Valley  
12 Hospital, Inc. v. Local 444 UFCW Welfare Reimbursement Plan,  
13 388 F. 3d. 393. There's also been another Third Circuit case  
14 of some importance, Community Medical Center v. Local 44A, 143  
15 F. 3d. 433. And there's been various District Court decisions  
16 in the Third Circuit, and certainly in the new -- District of  
17 New Jersey following those cases, some of which have been  
18 alluded to here.

19           One decision that was attached to one of the papers,  
20 addressed the issue in a very simple fashion. This was the  
21 Bayonne Medical Center v. Local Three Bakers case, Docket 05-  
22 5846, in which Judge Greenaway issued an order and said, and I  
23 quote from the order, "In Community Medical Center and Pascack,  
24 the Third Circuit held that a breach of contract suit against  
25 an employee welfare plan by a hospital is not removable as

The Court

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1 arising under the Federal common law of E.R.I.S.A., because the  
2 hospital did not have standing to bring a suit under E.R.I.S.A.  
3 ~~And because the plaintiff's breach-of contract claims were~~  
4 predicated on a legal duty that was independent of E.R.I.S.A."  
5 Community Medical Center and Pascack were signed -- I mean were  
6 cited, and Judge Greenaway continues the same reasoning applies  
7 here and the outcome must be the same. Other judges in this  
8 district have decided the same issue based on the same rather  
9 simple statement. And that really could, to some extent, end  
10 the inquiry here.

11           However, there have been certain other issues raised  
12 in this case, so I will address them. But to really place  
13 everything in context, you get back to Pascack Valley, and  
14 there's no advantage to having the Magistrate Judge trying to  
15 paraphrase or to state the holding and the area dict statement  
16 of the law in Pascack Valley. And I think that would be un --  
17 inefficient and unnecessary for me to try to put into my own  
18 words. But to place things in context, I'll simply quote at  
19 some length from the Pascack case, because it informs the  
20 Court's recommendation here, and also places in context for  
21 Judge Ackerman the issue at hand.

22           Pascack sets out the law beginning at the beginning,  
23 "A civil action," I'm quoting, "filed in the State Court may be  
24 removed to the Federal Court, if the claim is one arising under  
25 Federal Law. Under the Well Pleaded Complaint Rule the

The Court

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1 plaintiff is ordinarily entitled to remain in State Court so  
2 long as its complaint does not, on its face, affirmatively  
3 ~~allege a Federal claim." -- I'm leaving the cites out.~~ "Federal  
4 preemption is ordinarily a defense to a plaintiff's suit, and  
5 as such does not appear on the face of a well pleaded  
6 complaint." In the Pascack Valley case, which I think is  
7 similar here, the hospital's complaint does not present a  
8 Federal question, rather the complaint states -- asserts State  
9 Common Law claims for breach of contract. The complaint does  
10 not expressly refer to E.R.I.S.A., and the rights for immunities  
11 created under E.R.I.S.A. are not elements, let alone essential  
12 elements of the plaintiff's claims. The possibility or even  
13 likelihood that E.R.I.S.A.'s preemption provisions, Provision  
14 29 U.S.C. 1144a may preempt the hospital State claims is not a  
15 sufficient basis for removal.

16 Now, to go on here. Although the, and I'm skipping  
17 around, but still quoting from Pascack. "Although the well  
18 pleaded complaint rule would ordinarily bar the removal of an  
19 action to Federal Court where Federal jurisdiction is not  
20 presented. On the face of the plaintiff's complaint, the  
21 action may be removed if it falls within the narrow class of  
22 cases to which the doctrine of complete preemption applies."  
23 That citing the recent Aetna Health, Inc. v. Daeverler  
24 (phonetic), 542 U.S., I don't have the page, but it's the  
25 United States Supreme Court case of 2004. And the question is

The Court

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1 raised as to E.R.I.S.A.'s Civil Enforcement Provision, Section  
2 502, which is described in Pascack as one of those provisions  
3 with such extraordinary preemptive power that it converts an  
4 ordinary State Common Law complaint into one stating a Federal  
5 claim for purposes of the Well Pleaded Complaint Rule.

6 The Supreme Court when faced with that kind of an  
7 issue, whether it's within the scope, and therefore preempted  
8 and removable, has recently clarified the inquiry in such  
9 cases. It follows that if an individual brings suit  
10 complaining of a denial of coverage for medical care, where the  
11 individual is entitled to such coverage only because of the  
12 terms of an E.R.I.S.A. regulated employee benefit plan, and  
13 where no legal duty, State or Federal, independent of  
14 E.R.I.S.A. or the plan terms is violated, then the suit falls  
15 within the scope of 502a1B.

16 In other words, if an individual at some point in  
17 time could've brought his claim under E.R.I.S.A. 502a1B, and  
18 where there's no other independent legal duty that is  
19 implicated by a defendant's actions, then the individual cause  
20 of action is completely preempted by E.R.I.S.A. And then you  
21 really get to the crux of the decisional issue in this case.

22 Accordingly, quote, "This case is removable only if,  
23 one, the hospital could have brought its breach of contract  
24 claim under Section 502a, and, and underscored, two, no other  
25 legal duty supports the hospital's claim." Of course, at that

The Court

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1 point the Court then concluded the hospital could not have  
2 brought its claims under 502a, and there's an extensive  
3 discussion of that. -- 502a, the statute is limited to  
4 participants and beneficiaries. So in Pascack the Court found  
5 that the hospital had failed to establish -- the defendant  
6 failed to establish that the hospital could've brought its  
7 claim under 502, because based on the Court's finding that the  
8 hospital did not have standing to sue under E.R.I.S.A because  
9 there was no evidence in the record. This was the PASCACK  
10 VALLEY rationale that the hospital was one of the enumerated  
11 parties permitted to bring a claim under 502a.

12 The third -- the Court in Pascack Valley did state  
13 that the Third Circuit had not resolved whether a hospital can  
14 establish standing to sue under 502a of E.R.I.S.A., based on an  
15 assignment of a claim from a participant or beneficiary. But  
16 didn't address that issue because it found that there was no  
17 actual evidence of an assignment in the record.

18 Plaintiff argues that the hospital could have -- I'm  
19 sorry. The defendant argues that the hospital could have  
20 brought its claim under E.R.I.S.A. 502a, because unlike the  
21 hospital in Pascack Valley, in this case, it is clear that the  
22 hospital holds a valid assignment for both claims that relate  
23 to this action. And evidence of that assignment has been  
24 placed in the record.

25 The defendant points out that the Pascack Valley

The Court

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1 Court noted, quote, "almost every Circuit to have considered  
2 the question has held that a health care provider can assert a  
3 claim under 502a, where a beneficiary or participant has  
4 assigned to the provider the individual's right to benefits  
5 under the plan." That's true, almost every Circuit, but not  
6 the Third Circuit, at this time, at this point. And that issue  
7 is -- is out there.

8 But getting back to it, the crux of the case, I said,  
9 is whether the hospital could bring the case under 502a, and  
10 more importantly that no other legal duty supports the  
11 hospital's claim.

12 Now, the Court is not of the view that the presence  
13 or absence of record of the -- anything in the record regarding  
14 the assignment is dispositive of the issue here. However, even  
15 if that were the case, and even if there was Third Circuit  
16 authority, the Court finds that the defendant still cannot  
17 maintain Federal jurisdiction. Because the second prong of the  
18 analysis cannot be met. The Third Circuit in Pascack Valley  
19 held, quote, "We further conclude that the hospital's State Law  
20 claims are predicated on a legal duty that is independent of  
21 E.R.I.S.A." citing Daverler. The crux of the parties dispute  
22 is the meeting basically of the subscriber agreement. I left  
23 some language out from the quote. "For coverage and  
24 eligibility disputed, interpretation of the plan might form an  
25 essential part of the hospital's claims. However, coverage and

1       eligibility do not seem to be in dispute in this case. The  
2       resolution of the lawsuit requires the interpretation of the  
3       subscriber agreement, not the plan. The hospital's right to  
4       recovery, if it exists, depends entirely on the operation of  
5       contracts that are independent of the plan itself, or arguably  
6       independent."

7                  The Third Circuit does some analysis of this, and  
8       they refer to a 9<sup>th</sup> Circuit case, and they say, quote, "We find  
9       instructive the 9<sup>th</sup> Circuit's opinion in Blue Cross California  
10      v. Anesthesia Care Associates Medical Group, 187 F. 3d 104-5."  
11     In that case, the Court held that claims asserted by health  
12    care providers against the health care plan for breach of their  
13   provider agreements were not completely preempted. The Court  
14   reached the conclusion notwithstanding the fact that these  
15   medical providers obtained assignments of benefits from  
16   beneficiaries of the E.R.I.S.A. covered health care plans. The  
17   Court held that the provider's claims were not claims for  
18   benefits under E.R.I.S.A. plans. The providers are asserting  
19   contractual breaches that their patients assignors could not  
20   assert the patients are simply not parties to the provider  
21   agreements. The dispute is not over the right to payment, but  
22   the amount.

23                  So, to summarize, I think plaintiff's argument that  
24   the main distinction between this case and Pascack is that in  
25   that case there was no evidence of an assignment in the record,

The Court

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1 and here there is evidence of an assignment, but is unavailing  
2 for a variety of reasons.

3 First of all, the Third Circuit has remanded all such  
4 claims that I've seen and that have been brought to the  
5 attention of this Court, and certainly, the District Court has  
6 done so as well. Despite references to assignments, and we  
7 just heard that reference actually from Pascack Valley.

8 Although, Pascack Valley passed on the assignment issue because  
9 it wasn't in the record.

10 But more importantly, the second prong, as I stated,  
11 cannot be overcome in which the Pascack Court said, we  
12 conclude that the hospital State Law claims are predicated on a  
13 legal duty that is independent of E.R.I.S.A. The hospital  
14 claims to be sure or derived from an E.R.I.S.A. plan and exist  
15 only because of that plan. The crux of the parties dispute is  
16 the meaning of the agreement, the contract that goes to the  
17 discounted rates. So, the hospital's right to recovery, if it  
18 exists, depends on the operation of those third party contracts  
19 executed by the plan.

20 I do also want to note in Pascack Valley that  
21 Justice, then Judge Alito issued a concurrence. And he did  
22 make reference to the fact that the issue really hadn't been  
23 decided in this Circuit. However, the Court's reading of his  
24 concurrence suggests clearly that the formality, at least in  
25 Justice Alito's mind or view, was relatively unimportant.

1 Justice Alito states that in Pascack the Court very well could  
2 have and should have assumed an assignment was made. Because  
3 he goes on to say, it's sort of obvious or common that that is  
4 the way that these cases and proceed, not so much these cases,  
5 but that's the way the business interaction proceeds. By  
6 concurring in the remand and the judgement, Judge Alito made  
7 clear his conclusion, that the action should be remanded  
8 despite what he would, I think, refer to as an assumed  
9 assignment. And I think Judge Alito's concurrence contradicts  
10 the defendant's argument, well not binding, certainly  
11 contradicts the defendant's argument that assignment, the  
12 record evidence of the assignment is a dispositive legal issue.

13 Finally, the Court will deny the request for counsel  
14 fees and sanctions. Although, Pascack is out there, we see  
15 that there is a tremendous amount of litigation since. There  
16 was a legitimate issue raised in this case. It was a  
17 legitimate, factual difference in this case about the presence  
18 of an assignment, and a difference of opinion over the law. So  
19 this is in no way a frivolous matter, and there's no right to  
20 counsel fees in the Court's view.

21 Therefore to conclude, the Court respectfully  
22 recommends to District Judge Ackerman that the plaintiff's  
23 motion to remand be granted, and the motion for counsel fees be  
24 denied. I'm going to order a copy of the transcript of this  
25 report and recommendation, which should be available within a

The Court - Decision/Colloquy/  
Certification

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1 couple of days, and appended to my report and recommendation to  
2 Judge Ackerman. Of course, I remind the parties of what the  
3 rules provide for responding to, if anyone sought to or  
4 objecting to the report and recommendation. That's all.

5 Anything further, counsel?

6 MR. KASSAR: No thank you, Your Honor.

7 THE COURT: Okay.

8 MR. KASSAR: Thank you, Judge.

9 THE COURT: Thank you very much.

10 MS. GOMEZ: Thank you, Your Honor.

12 (Proceeding concluded)

13 Certification

14 I, Patricia Wtulich, assigned transcriber, certify that  
15 the foregoing is a correct transcript from the official  
16 electronic sound recording of the proceedings in the above-  
17 entitled matter.

19 Patricia Wtulich  
20 Signature of Assigned Transcriber

8-12-06  
Date

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CERTIFICATION

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